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February 7, 2000

Heat and Control, Inc.  
21121 Cabot Blvd.  
Hayward, CA 94545-1132

Dear Sir or Madam:

This letter is to inform you of the recent issuance of our U.S. Patent No. 5,952,027, entitled "Improved Method for Browning Precooked, Whole Muscle Meat Products". A copy of the patent is enclosed.

The patent is directed to a highly effective and efficient process for browning whole muscle meat products, such as turkey and chicken breasts. At least a portion of the surface of meat product is coated with a liquid pyrolysis product. The coated surface is then exposed to an energy source that selectively heats the coated surface at a temperature and for a time sufficient to develop a golden-brown color on the exposed surface, without substantially shrinking the meat product.

Others in the industry may approach your company regarding this patent, and we would appreciate it if you would inform them that we intend to aggressively protect all of our rights under this patent.

Sincerely,

Christopher P. Salm, Ph.D.  
Vice President - R&D

cs/pkp

Enclosure

CONFIDENTIAL -  
Restricted Access

CRPF05154

bsccyvsm\heat and control

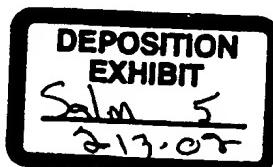


EXHIBIT Q

PTO-003324

February 7, 2000

Mr. Charles R. Parker  
Scan America  
9505 N. Congress Avenue  
Kansas City, MO 64153

Dear Mr. Parker:

This letter is to inform you of the recent issuance of our U.S. Patent No. 5,952,027, entitled "Improved Method for Browning Precooked, Whole Muscle Meat Products". A copy of the patent is enclosed.

The patent is directed to a highly effective and efficient process for browning whole muscle meat products, such as turkey and chicken breasts. At least a portion of the surface of meat product is coated with a liquid pyrolysis product. The coated surface is then exposed to an energy source that selectively heats the coated surface at a temperature and for a time sufficient to develop a golden-brown color on the exposed surface, without substantially shrinking the meat product.

Others in the industry may approach your company regarding this patent, and we would appreciate it if you would inform them that we intend to aggressively protect all of our rights under this patent.

Sincerely,

Christopher P. Salm, Ph.D.  
Vice President - R&D

cs/pkp

Enclosure

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CRPF05146

PTO-003325



3131 Woodcreek Drive  
Downers Grove, IL 60515  
(630) 512-1000

**Refrigerated Prepared Foods**

March 21, 2000

Mr. John H. Bryan, Chairmen & CEO  
Sara Lee Corporation  
3 First National Plaza  
Chicago, IL 60602

Dear Mr. Bryan:

This letter is to inform you of the recent issuance of our U.S. Patent No. 5, 952,027, entitled "Improved Method for Browning Precooked, Whole Muscle Meat Products". A copy of the patent is enclosed.

The patent is directed to a highly effective and efficient process for browning whole muscle meat products, such as turkey and chicken breasts. At least a portion of the surface of meat product is coated with a liquid pyrolysis product. The coated surface is then exposed to an energy source that selectively heats the coated surface at a temperature and for a time sufficient to develop a golden-brown color on the exposed surface, without substantially shrinking the meat product.

We intend to aggressively protect all of our rights under this patent. If your company has an interest in discussing the application of this patented process, please contact me to discuss it.

Sincerely,

A handwritten signature in black ink, appearing to read 'Christopher P. Salm'.

Christopher P. Salm, Ph.D.  
Vice President - R&D

cs/pkp

Enclosure

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Restricted Access**

**CRPF05141**

*lusecy/salm@sara lee*

**PTO-003326**



3131 Woodcreek Drive  
Downers Grove, IL 60515  
(630) 512-1000

**Refrigerated Prepared Foods**

March 21, 2000

Mr. Bob Turley, President  
Carolina Turkey Co.  
P.O. Box 589  
Mount Olive, NC 28365

Dear Mr. Turley:

This letter is to inform you of the recent issuance of our U.S. Patent No. 5,952,027, entitled "Improved Method for Browning Precooked, Whole Muscle Meat Products". A copy of the patent is enclosed.

The patent is directed to a highly effective and efficient process for browning whole muscle meat products, such as turkey and chicken breasts. At least a portion of the surface of meat product is coated with a liquid pyrolysis product. The coated surface is then exposed to an energy source that selectively heats the coated surface at a temperature and for a time sufficient to develop a golden-brown color on the exposed surface, without substantially shrinking the meat product.

We intend to aggressively protect all of our rights under this patent. If your company has an interest in discussing the application of this patented process, please contact me to discuss it.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher P. Salm".

Christopher P. Salm, Ph.D.  
Vice President - R&D

cs/pkp

Enclosure

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Restricted Access**

**CRPF05147**

*bsw/salm/willow*

**PTO-003327**



3131 Woodcreek Drive  
Downers Grove, IL 60515  
(630) 512-1000

**Refrigerated Prepared Foods**

March 21, 2000

Mr. Tom Foster, CEO  
Foster Farms, Inc.  
P.O. Box 457  
Livingston, CA 95334

Dear Mr. Foster:

This letter is to inform you of the recent issuance of our U.S. Patent No. 5,952,027, entitled "Improved Method for Browning Precooked, Whole Muscle Meat Products". A copy of the patent is enclosed.

The patent is directed to a highly effective and efficient process for browning whole muscle meat products, such as turkey and chicken breasts. At least a portion of the surface of meat product is coated with a liquid pyrolysis product. The coated surface is then exposed to an energy source that selectively heats the coated surface at a temperature and for a time sufficient to develop a golden-brown color on the exposed surface, without substantially shrinking the meat product.

We intend to aggressively protect all of our rights under this patent. If your company has an interest in discussing the application of this patented process, please contact me to discuss it.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher P. Salm".

Christopher P. Salm, Ph.D.  
Vice President – R&D

cs/pkp

Enclosure

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**CRPF05150**

bsecy:salm\foster farms

**PTO-003328**



3131 Woodcreek Drive  
Downers Grove, IL 60515  
(630) 512-1000

**Refrigerated Prepared Foods**

March 21, 2000

Mr. E.M. Johnson, President  
House of Raeford Farms, Inc.  
520 E. Central Ave.  
Raeford, NC 28376-3020

Dear Mr. Johnson:

This letter is to inform you of the recent issuance of our U.S. Patent No. 5,952,027, entitled "Improved Method for Browning Precooked, Whole Muscle Meat Products". A copy of the patent is enclosed.

The patent is directed to a highly effective and efficient process for browning whole muscle meat products, such as turkey and chicken breasts. At least a portion of the surface of meat product is coated with a liquid pyrolysis product. The coated surface is then exposed to an energy source that selectively heats the coated surface at a temperature and for a time sufficient to develop a golden-brown color on the exposed surface, without substantially shrinking the meat product.

We intend to aggressively protect all of our rights under this patent. If your company has an interest in discussing the application of this patented process, please contact me to discuss it.

Sincerely,

Christopher P. Salm, Ph.D.  
Vice President - R&D

cs/pkp

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**CONFIDENTIAL -  
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**CRPF05152**

l:\secysalm\house of raeford

**PTO-003329**



3131 Woodcreek Drive  
Downers Grove, IL 60515  
(630) 512-1000

**Refrigerated Prepared Foods**

March 21, 2000

Mr. James N. Rieth, President & CEO  
Jenn-O Foods, Inc.  
2505 Willmar Ave. SW  
Willmar, MN 56201-2711

Dear Mr. Rieth:

This letter is to inform you of the recent issuance of our U.S. Patent No. 5,952,027, entitled "Improved Method for Browning Precooked, Whole Muscle Meat Products". A copy of the patent is enclosed.

The patent is directed to a highly effective and efficient process for browning whole muscle meat products, such as turkey and chicken breasts. At least a portion of the surface of meat product is coated with a liquid pyrolysis product. The coated surface is then exposed to an energy source that selectively heats the coated surface at a temperature and for a time sufficient to develop a golden-brown color on the exposed surface, without substantially shrinking the meat product.

We intend to aggressively protect all of our rights under this patent. If your company has an interest in discussing the application of this patented process, please contact me to discuss it.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher P. Salm".

Christopher P. Salm, Ph.D.  
Vice President - R&D

cs/pkp

Enclosure

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Restricted Access**

**CRPF05155**

I:\cccy\salm\jenn\

**PTO-003330**



3131 Woodcreek Drive  
Downers Grove, IL 60515  
(630) 512-1000

**Refrigerated Prepared Foods**

March 21, 2000

Mr. Dan Mittel, President  
Sunday House Foods, Inc.  
2523 Heather Path  
San Antonio, TX 78232

Dear Mr. Mittel:

This letter is to inform you of the recent issuance of our U.S. Patent No. 5, 952,027, entitled "Improved Method for Browning Precooked, Whole Muscle Meat Products". A copy of the patent is enclosed.

The patent is directed to a highly effective and efficient process for browning whole muscle meat products, such as turkey and chicken breasts. At least a portion of the surface of meat product is coated with a liquid pyrolysis product. The coated surface is then exposed to an energy source that selectively heats the coated surface at a temperature and for a time sufficient to develop a golden-brown color on the exposed surface, without substantially shrinking the meat product.

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Sincerely,

A handwritten signature in black ink, appearing to read 'Christopher P. Salm'.

Christopher P. Salm, Ph.D.  
Vice President – R&D

cs/pkp

Enclosure

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Restricted Access

CRPF05157

L:\secy\salm\Sunday house foods

PTO-003331

**Con  
Agra.**

**Refrigerated Prepared Foods**

2001 Butterfield Road  
Downers Grove, IL 60515-1049  
(630) 512-1157  
(630) 512-1121 Fax

Dennis C. Gott  
Vice President  
General Counsel & Secretary

July 8, 2000

Sunday House Foods Inc.  
Dan Mittel, President  
2523 Heather Path  
San Antonio, TX 78232

Re: Patent License

Dear Mr. Mittel:

Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods, a subsidiary of ConAgra, Inc., has been awarded United States patent No. 5,952,027, entitled "Method for Browning Precooked, Whole Muscle Meat Products". Corresponding patents are being sought in other countries.

Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods is making the '027 patent and corresponding patents that may issue available for license at a royalty rate of 10¢ per pound, adjusted for inflation, to all responsible parties who have not infringed these patents. A copy of the license that is being offered is attached. Anyone wishing to arrange a license should contact Chris Salm, Vice President, Research & Development, at 3131 Woodcreek Drive, Downers Grove, IL, 60515, 630-512-1339.

Sincerely,



Dennis C. Gott

DCG:lsf

Attachment

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Restricted Access**

CRPF05158

PTO-003332

**Con  
Agra.**

**Refrigerated Prepared Foods**

2001 Butterfield Road  
Downers Grove, IL 60515-1049  
(630) 512-1157  
(630) 512-1121 Fax

**Dennis C. Gott**  
Vice President  
General Counsel & Secretary

July 8, 2000

Jenni-O Foods, Inc.  
James N. Rieth, President/CEO  
2505 Willmar Avenue SW  
Willmar, MN 56201-2711

**Re: Patent License**

Dear Mr. Rieth:

Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods, a subsidiary of ConAgra, Inc., has been awarded United States patent No. 5,952,027, entitled "Method for Browning Precooked, Whole Muscle Meat Products". Corresponding patents are being sought in other countries.

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Sincerely,



Dennis C. Gott

DCG:lsf

Attachment

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**CRPF05156**

**PTO-003333**

**Con  
Agra,**

**Refrigerated Prepared Foods**

2001 Butterfield Road  
Downers Grove, IL 60515-1049  
(630) 512-1157  
(630) 512-1121 Fax

**Dennis C. Gott**  
Vice President  
General Counsel & Secretary

July 8, 2000

House of Raeford Farms, Inc.  
E. M. Johnson, President  
520 E. Central Avenue  
Raeford, NC 28376-3020

Re: Patent License

Dear Mr. Johnson:

Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods, a subsidiary of ConAgra, Inc., has been awarded United States patent No. 5,952,027, entitled "Method for Browning Precooked, Whole Muscle Meat Products". Corresponding patents are being sought in other countries.

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Sincerely,



Dennis C. Gott

DCG:lsf

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**CRPF05153**

**PTO-003334**

**Con  
Agra**

**Refrigerated Prepared Foods**

2001 Butterfield Road  
Downers Grove, IL 60515-1049  
(630) 512-1157  
(630) 512-1121 Fax

**Dennis C. Gott**  
Vice President  
General Counsel & Secretary

July 8, 2000

Foster Farms, Inc.  
Tom Foster, CEO  
PO Box 457  
Livingston, CA 95334

**Re: Patent License**

Dear Mr. Foster:

Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods, a subsidiary of ConAgra, Inc., has been awarded United States patent No. 5,952,027, entitled "Method for Browning Precooked, Whole Muscle Meat Products". Corresponding patents are being sought in other countries.

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Sincerely,



Dennis C. Gott

DCG:lsf

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**CRPF05151**

**PTO-003335**



**Refrigerated Prepared Foods**

2001 Butterfield Road  
Downers Grove, IL 60515-1049  
(630) 512-1157  
(630) 512-1121 Fax

Dennis C. Gott  
Vice President  
General Counsel & Secretary

July 8, 2000

Carolina Turkey Co.  
Bob Turley, President  
P. O. Box 589  
Mount Olive, NC 28365

Re: Patent License

Dear Mr. Turley:

Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods, a subsidiary of ConAgra, Inc., has been awarded United States patent No. 5,952,027, entitled "Method for Browning Precooked, Whole Muscle Meat Products". Corresponding patents are being sought in other countries.

Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods is making the '027 patent and corresponding patents that may issue available for license at a royalty rate of 10¢ per pound, adjusted for inflation, to all responsible parties who have not infringed these patents. A copy of the license that is being offered is attached. Anyone wishing to arrange a license should contact Chris Salm, Vice President, Research & Development, at 3131 Woodcreek Drive, Downers Grove, IL, 60515, 630-512-1339.

Sincerely,

Dennis C. Gott

DCG:lsf

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CRPF05148

PTO-003336



**Refrigerated Prepared Foods**

2001 Butterfield Road  
Downers Grove, IL 60515-1049  
(630) 512-1157  
(630) 512-1121 Fax

Dennis C. Gott  
Vice President  
General Counsel & Secretary

July 8, 2000

Sara Lee Corporation  
George Chivari, President  
3 First National Plaza  
Chicago, IL 60602

Re: Patent License

Dear Mr. Chivari:

Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods, a subsidiary of ConAgra, Inc., has been awarded United States patent No. 5,952,027, entitled "Method for Browning Precooked, Whole Muscle Meat Products". Corresponding patents are being sought in other countries.

Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods is making the '027 patent and corresponding patents that may issue available for license at a royalty rate of 10¢ per pound, adjusted for inflation, to all responsible parties who have not infringed these patents. A copy of the license that is being offered is attached. Anyone wishing to arrange a license should contact Chris Salm, Vice President, Research & Development, at 3131 Woodcreek Drive, Downers Grove, IL, 60515, 630-512-1339.

Sincerely,

Dennis C. Gott

DCG:lsf

Attachment

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CRPF05145

PTO-003337



2001 Butterfield Road  
Downers Grove, IL 60515-1049  
(630) 512-1157  
(630) 512-1121 Fax

**Refrigerated Prepared Foods**

Dennis C. Gott  
Vice President  
General Counsel & Secretary

July 8, 2000

Willow Brook Foods  
Michael Briggs, CEO  
405 N. Jefferson Avenue  
Springfield, MO 65806

Re: Patent License

Dear Mr. Briggs:

Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods, a subsidiary of ConAgra, Inc., has been awarded United States patent No. 5,952,027, entitled "Method for Browning Precooked, Whole Muscle Meat Products". Corresponding patents are being sought in other countries.

Swift-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods is making the '027 patent and corresponding patents that may issue available for license at a royalty rate of 10¢ per pound, adjusted for inflation, to all responsible parties who have not infringed these patents. A copy of the license that is being offered is attached. Anyone wishing to arrange a license should contact Chris Salm, Vice President, Research & Development, at 3131 Woodcreek Drive, Downers Grove, IL, 60515, 630-512-1339.

Sincerely,

Dennis C. Gott

DCG:lsf

Attachment

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CRPF05140

PTO-003338

## APPENDIX A

### ROYALTY REPORT

This quarterly royalty report, pertaining to the quarter ending on \_\_\_\_\_,  
H-Eckrich, Inc. d/b/a ConAgra Refrigerated Prepared Foods ("CRPF") to comply  
with the obligations of LICENSEE under an Agreement with CRPF pertaining to U.S. patent No.  
No. 3,670,027 ("the '027 patent") and related patents in the United States and other countries.

Set forth below is a list of all facilities anywhere in the world at which a process  
claimed in the '027 patent, or any foreign patent licensed under the Agreement, has  
been used during the quarter in question, and a statement of the amount of product made at  
each facility using such a process:

Location of facility: \_\_\_\_\_

Pounds of product made \_\_\_\_\_

This facility is ( ) is not ( ) located in a country in  
which a patent licensed by CRPF has been issued.

Location of facility: \_\_\_\_\_

Pounds of product made \_\_\_\_\_

This facility is ( ) is not ( ) located in a country in  
which a patent licensed by CRPF has been issued.

Location of facility: \_\_\_\_\_

Pounds of product made \_\_\_\_\_

This facility is ( ) is not ( ) located in a country in  
which a patent licensed by CRPF has been issued.

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CRPF05135

LICENSE AGREEMENT

THIS AGREEMENT, effective \_\_\_\_\_, is between Swift-Eckrich, Inc., doing business as ConAgra Refrigerated Prepared Foods ("CRPF"), having a place of business at 2001 Butterfield Road, Downers Grove, Illinois 60515, and \_\_\_\_\_, having a place of business at \_\_\_\_\_ (hereinafter referred to as "LICENSEE").

WHEREAS, CRPF is the assignee and owner of all right, title and interest in United States patent No. 5,952,027 entitled "Method for Browning Precooked, Whole Muscle Meat Products" (the "'027 patent") and based on United States patent application, Serial No. 09/075,608.

WHEREAS, CRPF is also the assignee of a pending International Patent Application, Serial No. PCT/US99/09651, which is based on United States patent application Serial No. 09/075,608 and corresponds to the '027 patent.

WHEREAS, LICENSEE desires a license under the '027 patent and any counterparts thereof in foreign countries upon the terms and conditions set forth in this Agreement.

IT IS, THEREFORE, AGREED by and between the parties hereto as follows:

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CRPF05127

PTO-003340

## **ARTICLE I**

### **DEFINITIONS**

1. As used herein, "LICENSED TERRITORY" means The United States of America, its territories and possessions and any and all foreign countries in which CRPF obtains patent rights based on United States patent application Serial No. 09/075,608 or pending patent application, Serial No. 09/075,608.
2. As used herein "LICENSED PATENTS" shall mean the '027 patent and any reissues thereof and any other patents that may be issued in foreign countries claiming priority under United States patent application Serial No. 09/075,608 or based on pending patent application Serial No. PCT/US99/09651.

## **ARTICLE II**

### **GRANT OF LICENSE**

CRPF hereby grants to LICENSEE, upon the terms and conditions herein set forth below, a non-exclusive right and license under the LICENSED PATENTS.

## **ARTICLE III**

### **CONSIDERATION**

1. LICENSEE agrees to pay CRPF a one-time licensing fee (on signing) of \$25,000 plus a royalty as set forth in Article III, Paragraph 2 hereof.
2. LICENSEE shall pay royalties at an initial royalty rate, which becomes applicable on the signing of this Agreement, of \$0.10 for each pound of saleable product made by the use of a process that, were it not for this Agreement, would infringe any of the LICENSED PATENTS

by reason of the process having been carried out in a country in which a LICENSED PATENT has been issued. Additional royalties shall be paid at the same rate on any such products that have been made in countries in which no LICENSED PATENT has issued, but are sold in countries in which a LICENSED PATENT has issued.

3. Beginning on July 1, 2001, and annually thereafter on July 1 of each year that this Agreement is in force and effect, the initial royalty rate set forth in Article III, Paragraph 2 hereof shall be adjusted to compensate for inflation as measured by the Consumer Price Index ("CPI") of the United States Department of Commerce. Thus, beginning on July 1, 2001, the initial royalty shall be increased by the annual percentage increase of the then-current CPI over that which existed on July 1, 2000. Thereafter, on July 1, 2001 and each year thereafter that this Agreement is in force and effect, the royalty rate per pound shall be further increased by the percentage increase of the then-current CPI over the royalty rate per pound which existed twelve (12) months earlier. In the event that this Agreement is signed after July 1, 2000, the royalty rate to be paid by LICENSEE shall be calculated as if this Agreement had nevertheless been signed on July 1, 2000.

4. Payments of royalties shall be made quarterly within twenty (20) days following the close of each calendar quarter based on production by LICENSEE during such quarterly period.

5. All payments made by LICENSEE hereunder shall be in U.S. Dollars and shall be made to CRPF.

6. Accompanying each quarterly payment, LICENSEE shall furnish CRPF with a written Royalty Report, in a form substantially like that of Appendix A hereto, relative to the quarterly period for which payment is made, setting forth:

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- (a) Identification of all facilities in which a process falling within the claims of any of the LICENSED PATENTS has been carried out during the quarter to which the report pertains (regardless of whether a LICENSED PATENT has been issued in the country in which such facility is located) and the number of pounds of product produced at that facility using such a process;
- (b) For each facility located in a country in which a LICENSED PATENT has issued, a calculation of the royalty due for production at that facility; and
- (c) A quantification of all sales in countries in which a LICENSED PATENT has issued of products made by a process falling within the claims of a LICENSED PATENT as to which no royalty is due under paragraph (b) above because no LICENSED PATENT has issued in the country in which the process was carried out.

7. LICENSEE shall keep complete, accurate and up-to-date records underlying the calculation and verification of royalties to be paid, and shall make such records available for inspection during normal business hours by a representative of CRPF so that such representative may inspect such records and verify the accuracy of royalties paid and reported hereunder. Inspection may be made as a matter of right once during each calendar year. Should any such inspection reveal a deficiency of more than five percent (5%) in royalties reported to CRPF hereunder, the cost of that inspection shall be borne by LICENSEE.

## ARTICLE IV

### TERM AND TERMINATION

1. This Agreement shall remain in full force and effect until the expiration of all

LICENSED for NTS, unless sooner terminated as provided herein.

2. This Agreement may be terminated by CRPF, upon thirty (30) days' written notice, at any time during the term hereof, if LICENSEE fails to comply with any of the material terms of this Agreement, including specifically the terms relating to accounting and payment of royalties under Article III hereof, and fails to correct such failure within thirty (30) days of having received written notice from CRPF.

3. This Agreement may be terminated by LICENSEE upon thirty (30) days' written notice at any time and such termination by LICENSEE will take effect after the expiration of said thirty (30) days' written notice.

4. The expiration or termination of this Agreement by either party shall in no way affect the obligation of LICENSEE to pay any sums of money due in accordance with the terms and conditions herein set forth, up to and including the date of such expiration or termination, and shall be without prejudice to any right or rights of action or any remedies of CRPF for the recovery of any monies due or claimed to be due hereunder.

5. All royalties and monies past due from LICENSEE in breach of this Agreement shall be paid to CRPF bearing interest at an annual rate of 15% or the then-current maximum legal rate of interest allowable in the State of Illinois, whichever is lesser, until such royalties or monies past due are paid in full.

## ARTICLE V

### MISCELLANEOUS PROVISIONS

#### 1. Entire Agreement and Modification

This Agreement constitutes the entire agreement and understanding between the

ZEP

parties and supersedes all prior agreements and understandings, whether written or oral.

2. No Agency Relationship

This Agreement does not create any partnership, joint venture or agency relationship between the parties. LICENSEE shall have no right to enforce the LICENSED PATENT, share in the proceeds of any enforcement efforts, settle any infringement claims or grant sublicenses other than those necessarily implied by law as a result of the sale of products made under the license granted by this Agreement.

3. Rights Not Assignable

LICENSEE may not assign its rights or obligations under this Agreement without the written consent of CRPF.

4. Modifications

Modifications of this Agreement may, from time to time, be made by mutual consent of the parties, but in any event, no modification or claimed waiver of any provisions hereof shall be valid unless in writing and signed by an authorized representative of the party against whom such modification or waiver is sought to be enforced.

5. Invalid Clauses

It is understood and agreed by CRPF and LICENSEE that if any of the terms or provision of this Agreement shall contravene or be invalid under the laws of the United States, or any state, or any country wherein acts are to be performed pursuant to this Agreement, such contravention or invalidity shall not invalidate the whole Agreement, but it shall be construed as if not containing the particular terms or provision held to be invalid, and the rights and obligations of CRPF and LICENSEE shall be construed and enforced accordingly.

6. Enforcement

The failure of CRPF to insist in one or more instances upon a strict performance of any term or provision of this Agreement shall not be construed as a waiver or relinquishment for the future of any of the terms, provision, covenants and conditions herein contained, but the same shall continue and remain in full force and effect.

7. Notices

Notices under this Agreement shall either be delivered by hand, or sent by telegram, or registered mail to CRPF at the following address: ConAgra Refrigerated Prepared Foods, 2001 Butterfield Road, Downers Grove, IL 60515-1049; and to LICENSEE at

\_\_\_\_\_, and shall be deemed to have been given on the date when received by CRPF or by LICENSEE.

8. Applicable Law

This Agreement shall be interpreted in accordance with the laws of the State of Illinois, except for matters relating to choice of law and except that as to matters relating to patent law the law of the country that issued the patent in question shall be applied.

9. Choice of Forum

Any lawsuit relating to this Agreement shall be brought in a court located in the State of Illinois.

10. Force Majeure

Neither of the parties hereto shall be liable in damages or have the right to cancel this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to acts of God, government restrictions, wars or insurrections.

CONFIDENTIAL -  
Restricted Access

11. Paragraph Headings

The foregoing paragraph headings are included solely for convenience and shall not be deemed part of this Agreement and shall not be used for the interpretation thereof.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

SWIFT-ECKRICH, INC. d/b/a

CONAGRA REFRIGERATED PREPARED FOODS

By: \_\_\_\_\_

Title: \_\_\_\_\_

LICENSEE: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

22949.1

**FILED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

JUL 03 2002

ROBERT D. DENNIS, CLERK  
U.S. DIST. COURT, WESTERN DIST. OF OKLA.  
BY \_\_\_\_\_, DEPUTY

UNITHERM FOOD SYSTEMS, INC., )  
an Illinois corporation; and )  
JENNIE-O FOODS, INC., )  
a Minnesota corporation, )  
Plaintiffs, )  
v. ) Case No. CIV-01-347-C  
SWIFT-ECKRICH, INC. d/b/a ) FILED UNDER SEAL  
CONAGRA REFRIGERATED )  
FOODS, a Delaware corporation, ) CONFIDENTIAL-ATTORNEYS ONLY  
Defendant. )

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**PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO  
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT  
REGARDING PATENT INVALIDITY AND UNENFORCEABILITY**

---

Dated: July 3, 2002

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## **I. INTRODUCTION**

In its Response, Defendant now attempts to assign a special meaning to the term "golden brown." The attempt is improper and is unsupported by the claims, specification, and prosecution history of the '027 Patent. The uncontested evidence also establishes that the browning process which Unitherm has publicized, publicly used, offered for sale, and sold since at least 1993 encompasses all of the elements and limitations of the '027 Patent claims, including the production of a "golden brown" color using a "browning liquid pyrolysis product." In addition, Unitherm has not conducted these activities in any way which would prevent the application of the on-sale, public use, or publication bars of 35 U.S.C. § 102(b). Further, Defendant's own prior art use of the process to produce product offered and sold to the public remains uncontested.

As discussed in Plaintiffs' Motion For Partial Summary Judgment Regarding Patent Invalidity and Unenforceability, And Brief In Support ("Plaintiffs' Brief"), Plaintiffs remind the Court that only one offer, sale or publication is needed, as a matter of law, to establish invalidity under 35 U.S.C. §§ 102 and/or 103. Thus, Defendant's failure to refute each one of the numerous offers, sales and publications set forth in Plaintiffs' Brief is fatal to its Response.

## **II. DETERMINING THE MEANING AND SCOPE OF WORDS AND PHRASES USED IN THE PATENT CLAIMS IS A QUESTION OF LAW FOR THE COURT**

Throughout its Response, Defendant contends that the scope and meaning of the phrases "golden brown" and "browning liquid pyrolysis product" used in the '027 Patent claims are in dispute. Citing a 1986 Federal Circuit case, Defendant represents to the Court that such interpretation issues are questions of fact which must be resolved by the jury. However, pursuant to the much publicized decision of the U.S. Supreme Court in *Markman v. Westview Instruments*, 517 U.S. 370 (1996), it has been established that claim construction is a question of law for the Court to decide.<sup>1</sup>

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<sup>1</sup>Defendant does not cite *Markman* in its Response.

It is also well established that, when construing patent claim terms, the Court first looks to the intrinsic evidence of record, which is limited to the patent claims, the patent specification (*i.e.*, the written description of the patent), and the patent prosecution history (*i.e.*, the Patent Office “file wrapper”). *See, e.g., Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996); *Markman v. Westview Instruments*, 52 F.3d 967, 979 (Fed. Cir. 1995) (*en banc*), *aff’d*, 517 U.S. 370 (1996). Absent some objective, clearly stated intrinsic evidence to the contrary, words used in a patent claim are to be given their ordinary and customary meaning. *Vitronics*, 90 F.3d at 1582; *Gentex Corp. v. Donnelly Corp.* 69 F.3d 527, 530 (Fed. Cir. 1995); *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989 (Fed. Cir. 1999) (There is a “heavy presumption in favor of the ordinary meaning.”).

**A. The Meaning and Scope of “Golden Brown.”**

The specification of the ‘027 Patent broadly defines the term “golden brown” as encompassing (and also indicates that it is in fact the objective of the invention to provide) the appearance of naturally smoked, home-style baked, or roasted turkey, ham, or chicken products and also indicates that the golden brown color can range from light to dark. The specification states:

There exists a strong consumer demand for pre-cooked, whole muscle meat products, such as pre-cooked meat, poultry, and fish products having the appearance, texture, and taste of products that are naturally smoked or baked or roasted in a home-style oven.

(*See, App. A to Plaintiffs’ Brief, and Ex. “A” attached hereto, the ‘027 Patent, Col. 1:11-15*). The specification then discusses the “golden brown” colors “associated with products that are naturally smoked or baked or roasted in a home-style oven.” (*Id.*, Col. 2:13-15) The specification next states:

Thus, there remains a definite need for an effective method for browning pre-cooked, whole muscle meat products to produce product having the appearance, texture, and taste of their naturally smoked or home-style baked or roasted counterparts. (*Id.*, Col. 2:37-41)

The specification also provides:

Any whole muscle meat product can be advantageously browned in accordance with the invention. Representative whole muscle products include poultry, meat, and fish products, such as turkey breasts, chicken breasts, chicken nuggets, ham products, pork products, and the like. (*Id.*, Col. 3:49-54)

As to the fact that the "golden brown" color can range from light to dark, the specification expressly states at Col. 4:39-44 that:

For example, MAILLOSE is used without any dilution up to about 80 vol. % dilution with water. The higher the concentration of the MAILLOSE or other browning liquid pyrolysis product, the darker golden brown the final, whole muscle meat product.

This usage in the '027 Patent is also fully consistent with the ordinary meaning of the term "golden brown." *Webster's Third New International Dictionary*, 284 Merriam-Webster, Inc., 1993 defines "brown" as "any of a group of colors between red and yellow in hue, of medium to low lightness, and of moderate to low saturation." (*Id.*, at 284) The color "golden brown" is defined as "a variable color averaging a strong brown that is yellower and slightly darker than gold brown, yellower and paler than average russet, and yellower and less strong than rust." (*Id.* at 975).<sup>2</sup>

**B. Defendant's Interrogatory Responses Also Utilize the Same Broad Definition of "Golden Brown" as Set Forth in the Specification of the '027 Patent.**

In Plaintiffs' first interrogatory to Defendant, Defendant was required to state the Defendant's earliest dates of conception and the earliest dates of "actual reduction to practice" of the subject matter claimed in the patent.<sup>3</sup> Defendant stated that this was between February 1989 and December 1990. (*See, App. I to Plaintiffs' Brief, Defendant's Answer to Interrog. No. 1*). Defendant was then

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<sup>2</sup>"Although technical treatises and dictionaries fall within the category of extrinsic evidence, as they do not form a part of an integrated patent document, they are worthy of special note." *Vitronics*, 90 F.3d at 1584 n.6.

<sup>3</sup>"Conception" as defined in patent law "must include every feature or limitation of the claimed invention." *Kridl v. McCormick*, 105 F.3d 1446, 1449 (Fed. Cir. 1997); *Singh v. Brake*, 222 F.3d 1362, 1367 (Fed. Cir. 2000); *Coleman v. Dines*, 754 F.2d 353, 359 (Fed. Cir. 1985).

required in Interrogatory No. 3 to "describe the content and scope of each reduction to practice identified in your response to Interrogatory No. 1, including . . . the type and amounts of browning and flavoring agents used. . . and the surface colors and other results obtained." (*Id.*, Interrog. No. 3).<sup>4</sup>

As Defendant points out numerous times in its Response, every claim of the '027 Patent requires the development of a golden brown color. Thus, having no shortage of patent attorneys and knowing that any actual conception and reduction to practice of the claimed invention must have provided the development of a "golden brown color," Defendant responded to Interrogatory No. 3 as follows:

In the reduction to practice (which can occur only once), whole muscle turkey breasts, which had been precooked, prechilled, stripped and washed were placed in a high temperature Enercyst high velocity oven at 460-600°F for about 30-60 seconds, then dipped in continuously circulating and filtered liquid smoke from Red Arrow and placed in another high temperature Enercyst high velocity oven at 460-600°F for another 30-60 seconds resulting in a smoked color. There was no more than a one percent to three percent shrinkage level and the internal product core temperature changed less than 1°F.

(*See*, App. I to Plaintiffs' Brief, Defendant's Answer to Interrog. No. 3).

Therefore, consistent with the specification, Defendant acknowledges that the "smoked color" it allegedly produced is included within the definition of "golden brown" as used in the '027 Patent. Defendant also confirmed its understanding of the patent term "reduction to practice" by noting that the reduction to practice "can occur only once." Plaintiffs further note that Defendant has never withdrawn its claim to have reduced the claimed invention to practice in 1990 by producing a smoked color. (*See*, Def. Response, p.3, n.1).

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<sup>4</sup>Likewise, the "actual reduction to practice" of the conception must also encompass every element and limitation of the patent claim. D. Chisum, *Chisum on Patents* § 10.06 at p. 10-167; *Eaton v. Evans*, 204 F.3d 1094, 1097-98 (Fed. Cir. 2000); *Newkirk v. Lulejian*, 825 F.2d 1581, 1582, 3 USPQ2d 1793, 1794 (Fed. Cir. 1987); *UMC Electronics Co. v. United States*, 816 F.2d 647, 652 (Fed. Cir. 1987), cert. denied, 484 U.S. 1025 (1988).

**C. Defendant's Attempt to Redefine "Golden Brown" is Unsupported by the Patent Specification and Is Inconsistent Both with the Common Meaning of the Term and with Defendant's Past Usage.**

Knowing that the '027 Patent, as actually written, is invalid, and that it has committed inequitable conduct in withholding from the U.S. Patent Office information concerning both the Unitherm process and Defendant's own prior art activities, Defendant now wishes to redefine the term "golden brown." However, Defendant never actually tells us what its new definition is. Moreover, Defendant's efforts to impart some special definition to "golden brown" are inconsistent with the patent specification and with the ordinary meaning of the term. Most importantly, Defendant's position is also inconsistent with its own prior usage.

In its Response, Defendant does not deny that any of the numerous precooked, whole muscle turkey and ham products shown in Plaintiffs' videos and photographs or any of the "golden brown" or "browned" products referred to in Plaintiffs' documents and correspondence were "golden brown." Rather, Defendant now contends that it is impossible for Plaintiffs to prove that any product was "golden brown," unless "LAB values" were measured and reported. However, none of the patent claims contain any LAB value requirements. (*See*, App. A to Plaintiffs' Brief, Cols. 8-10). Nor do the specification or prosecution history of the '027 Patent ever define the term "golden brown" in terms of LAB value or range, or even tell the reader what LAB values are.

The only LAB values mentioned in the '027 Patent are readings reported for the specific products produced in Examples 1-5. (*Id.*, Cols. 5-7). However, the patent never discusses or assigns any significance to these values. In addition, the examples involved only skinless turkey breasts and all except one involved only the use of MAILLOSE. None involved any ham, chicken, fish, or other products covered by the patent claims. Moreover, rather than indicating that any of these LAB values constitutes a special definition for the term "golden brown," the specification expressly states

that the examples "are included to further illustrate the invention. They are not limitations thereon." (*Id.*, Col. 5:47-48; emphasis added).<sup>5</sup>

In fact, Defendant's Response never tells us what its new LAB definition of golden brown actually is. Further, if this new definition involves L, A, and/or B ranges of some sort, Defendant never indicates where these ranges begin, where they end, or how they relate to each other. Plaintiffs would assume that the two specific LAB values recited in patent examples 2 and 3 for "golden brown color" either constitute or fall within Defendant's new definition. However, nothing else is known. In fact, Defendant repeatedly contends that it is somehow up to Plaintiffs to now provide the missing LAB definition. (*See, e.g.*, Defendant's Response, ¶ 3, p. 3, fn. 18, p. 9, fn. 125, p. 40).<sup>6</sup>

Only one thing is certain as to Defendant's new definition of "golden brown." That is, whatever Defendant's definition may be, it is so narrow and so precise that, according to Defendant's

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<sup>5</sup>It is also significant that only Examples 2 and 3 of the '027 Patent actually state that the product produced by Defendant had "a golden brown color." The other three examples only state that a "browned turkey breast" was produced. Thus, if one adopts the same reasoning used by Defendant in responding the Plaintiffs' Brief and exhibits, it is not possible to know whether the LAB values stated in any of Examples 1, 4, and 5 are included within Defendant's new definition of golden brown.

"The following deposition testimony of Defendant's employee, Syed Hussain, provides just one humorous example.

- Q. Right. In 1991, were you able to produce a golden brown whole muscle meat product?
- A. That term golden brown is what I used.
- Q. No, I'm asking you. Were you able to produce a whole muscle meat product that was golden brown in 1991.
- A. I don't know the word golden brown. But it was brown in color.
- Q. In your eyes, was it golden brown?
- A. Show me what golden brown is.
- Q. Well, earlier you testified that these other products were golden brown. I believe you testified that the smoked product and the honey roasted product were both, in your words, golden brown. My question now is was this whole muscle meat product produced in 1991 with MAILLOSE, was it golden brown?
- A. Very similar to golden brown. If golden brown is the color you have identified. (Syed Hussain Dep., attached hereto as Ex. "B," pp. 63-64).

arguments and affidavits, photographs cannot capture it and the human mind is incapable of remembering or even recognizing it. In fact, this color, whatever it is, is so exact and precise that, according to Prem Singh and Chris Salm, it had not even been "defined" until 1997 and Defendant claims it as a trade secret. (*See* Singh Dep., attached hereto as Ex. "C", p 88; Salm Dep., attached hereto as Ex. "D," pp. 101-102, 109-111, 153, 156, 255-256). Chris Salm now also says that no one else in the industry had a commercial product satisfying Defendant's definition of golden brown. (Salm Dep., Ex. "D," pp. 179-181, 189-190, 213).

Not surprisingly, Defendant's attempted redefinition of "golden brown" is not only unsupported in the patent claims, specification, or prosecution history, it is also completely inconsistent with Defendant's own prior practices, procedures, and admissions. For example, Defendant's project manager for the launch of Defendant's own "golden brown" turkey products produced under the '027 Patent admits that Defendant's competitors had golden brown products on the market in 1997 and 1998 and that Defendant was in fact attempting to match some of these products. (Sue Burns Dep., attached hereto as Ex. "E," pp. 102-103).

In addition, although Defendant now contends that photographs cannot capture and the human mind cannot remember or even recognize the golden brown color required by the '027 Patent, Defendant also alleges that it successfully reduced the claimed process to practice in 1989/1990 and that it also produced other golden brown products. However, no LAB measurements were taken at the time of the reduction to practice or at the time the other productions were made (Salm Dep., Ex. "D," pp. 227-228). In fact, as noted above, Defendant contends that it had not even defined "golden brown" until 1997. Moreover, in case the Court is wondering how Defendant's own commercial production units produce and maintain products having the general shades of golden brown desired

by Defendant, they do so, of course, by visual comparison to photographs which they keep on file! (Salm Dep., Ex. "D," pp. 49, 152).

**D. Defendant's Attempt to Redefine "Golden Brown" Also Renders the Claims Indefinite, and Therefore Invalid, under 35 U.S.C. § 112, ¶ 2.**

Defendant's proposed reinterpretation of "golden brown" renders all of the claims of the '027 Patent indefinite, and therefore invalid, under 35 U.S.C. § 112, ¶ 2.<sup>7</sup> As shown above, it is impossible, using Defendant's new "definition," for those skilled in the art to know and understand the scope of the '027 Patent claims. Therefore, no one can determine whether or not they are infringing the patent.

Where the bounds of the claims are indeterminable, the claims are invalid under section 112, paragraph 2 as indefinite. *Personalized Media Communications, L.L.C. v. ITC*, 161 F.3d 696, 705 (Fed. Cir. 1998). "A decision as to whether a claim is invalid under this provision requires a determination whether those skilled in the art would understand what is claimed." *Amgen, Inc. v. Chugai Pharm. Co.*, 927 F.2d 1200, 1217 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 856 (1991); *Morton Int'l v. Cardinal Chem. Co.*, 5 F.3d 1464 (Fed. Cir. 1993), *on remand from*, 508 U.S. 83 (1993). The patent claims must be sufficiently precise to permit a potential competitor to determine whether or not he is infringing. *Id.* "When the meaning of claims is in doubt, especially when . . . there is close prior art, they are properly declared invalid." *Amgen*, 927 F.2d at 1218.

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<sup>7</sup>Section 112, paragraph 2 of U.S.C. Title 35 provides: "The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention."

**E. In Accordance with the Ordinary Meaning of the Term and as Described in the '027 Patent Specification, the Unitherm Browning Process Provides "Golden Brown" Product.**

Consistent with the ordinary meaning of the term and contrary to Defendant's attempted redefinition, the specification of the '027 Patent broadly indicates that "golden brown" includes the appearance of naturally smoked, home-style baked, and roasted turkey, ham and chicken products and that the golden brown color can range from light to dark. Nowhere in its Response does Defendant deny that the various precooked, whole muscle turkey and ham products shown in Plaintiffs' videos or photographs were golden brown. Rather, Defendant only attempts to avoid the issue altogether by asserting that, unless Unitherm took Hunter wand measurements of these products at the time and can now report LAB values corresponding to Defendant's presently unknown LAB definition, Defendant is unable to say whether the products were golden brown or not.

Only twice in Defendant's Response does it attempt to argue that any particular product produced by Unitherm was not golden brown. The first instance appears in footnote 36 on page 12 of Defendant's Response. In that footnote, Defendant misrepresents the testimony of Hussain at page 173:12-24 as stating that Unitherm did not produce golden brown products for Hussain in October of 1993. However, Hussain does not deny that the Unitherm product was golden brown. (Hussain Dep., Ex. "B," p. 161). Moreover, his testimony at page 173 is not addressing the October 1993 demonstrations. Rather, under questioning from Defendant's attorney, Hussain merely testifies that, under Defendant's proposed redefinition of the term "golden brown," he does not know what the term would mean and would not know whether any product he has ever produced in the past was or was not golden brown. (Ex. G to Defendant's Response, Hussain Dep., Ex. "B," p. 173).

The second instance appears in paragraph 40 on page 17 of Defendant's Response. Defendant misrepresents Singh's testimony at page 118 as stating that a demonstration of the Unitherm browning process conducted for him was a failure. However, the testimony cited by Defendant refers only to an alleged test by Singh where he was attempting to brown product without any coating whatsoever. Subsequently, Singh grudgingly admits that runs conducted using liquid smoke and MAILLOSE were "somewhat successful." (Singh Dep., Ex. "C," p. 118).

**III. UNITHERM'S NUMEROUS PUBLICATIONS,  
DEMONSTRATIONS, OFFERS TO SELL, AND SALES ALSO  
INVOLVED THE USE OF BROWNING LIQUID PYROLYSIS PRODUCTS**

The videos, photographs, documents, correspondence, and other evidence presented by Plaintiffs establish that Unitherm has repeatedly, since before 1993, used liquid smoke and/or MAILLOSE in the process at issue to produce golden brown, precooked, whole muscle turkey, ham, and other products. Thus, the liquid pyrolysis products used by Unitherm were clearly browning liquids.

In fact, the evidence shows that Unitherm has publicized, demonstrated, offered for sale, and sold the process numerous times since 1993 using MAILLOSE. MAILLOSE is expressly identified in column 4 of the '027 Patent as a browning liquid pyrolysis product. In addition, the evidence shows that Unitherm has also repeatedly used even the specific liquid smoke product (Red Arrow Select 24P) identified in Col. 4 of the '027 Patent. (*See, e.g.*, App. A to Plaintiffs' Brief, Howard Aff. Exs. 34, 60; *see also Id.*, Ex. 49 and App. Q to Plaintiffs' Brief, Wood Dep. Ex. 3).

Plaintiffs further note that the information and materials provided to Defendant by Red Arrow make clear that Red Arrow's CharSol Supreme liquid smoke product has essentially the same browning potential as MAILLOSE. (*See, Ex. U to Plaintiffs' Brief*). Unitherm's use of Red Arrow

CharSol Supreme can be seen, for example, in Appendix E to Plaintiffs' Brief, Howard Affidavit ¶ 56, p. U-05133; *see also* Ex. "G," ¶ 56, Howard's Amended Affidavit, attached hereto.<sup>8</sup>

#### **IV. THE UNITHERM PROCESS ALSO INCLUDED ALL OF THE OTHER ELEMENTS AND LIMITATIONS OF THE '027 PATENT CLAIMS**

In addition to its attempt to avoid the fact that, since at least 1993, the Unitherm process has provided "golden brown" products using browning liquid pyrolysis products such as MAILLOSE, SELECT 24P, CHAR SOL SUPREME, *etc.*, Defendant asserts that concerning the § 102(b) on-sale bar, Unitherm was selling an oven and was not selling a process. Unitherm's efforts to sell the process at issue are thoroughly addressed in Plaintiffs' Brief and need not be discussed again here. Plaintiffs note, however, Defendant Swift-Eckrich's admission in footnote 38 of its Response, on page 12, that Defendant's own former president, Arnold Mikelberg, acknowledged and testified that "Unitherm was selling a process, not just an oven, **to Swift-Eckrich.**" (Emphasis appears in Defendant's own footnote).

#### **V. THE "UNDISPUTED EVIDENCE" IN THIS CASE ESTABLISHES THAT UNITHERM DID NOT CONDUCT ITS ACTIVITIES UNDER ANY TYPE OF CONFIDENTIALITY OR SECRECY WHICH WOULD PREVENT THE APPLICATION OF ANY OF THE PUBLIC USE, ON-SALE, OR PUBLICATION BARS OF 35 U.S.C. § 102(b)**

In Defendant's earlier brief in support of its motion for attorneys fees filed February 6, 2002, Defendant affirmatively asserts:

In this case, the **undisputed evidence** established that *neither Plaintiff* made any meaningful effort to protect the secrecy of the process. Unitherm repeatedly disclosed the process for several years to third parties without notifying those parties that the information was confidential nor requiring confidentiality agreements.

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<sup>8</sup>Concerning Defendant's self-serving Declaration of Christopher Salm, Plaintiffs note Salm's own deposition testimony wherein Salm admits that he has no expertise in the area of browning through the use of liquid smoke products: "I don't know that you can get a golden brown smoked product. I don't know. I just don't know that. I suppose with the right combination of ingredients, maybe you could." (Salm Dep., Ex. "D," p. 217).

(See, excerpts Brief In Support Of Swift-Eckrich's Motion For Attorney's Fees, filed February 6, 2002, p. 21, attached hereto as Ex. "F"). (Emphasis added). "The undisputed evidence established that Plaintiffs did not take reasonable steps to preserve the secrecy of the process." (*Id.*) "[P]laintiffs utterly failed to protect the secrecy of the process. . ." (*Id.*) In addition, Defendant asserts that Unitherm voluntarily disclosed the process to Defendant "without restrictions or conditions." (Ex. "F" at p. 22). As explained in Plaintiffs' Response to Defendant's Motion for Attorneys Fees, Plaintiffs agree.

Plaintiffs have consistently maintained in this case that Unitherm has been openly demonstrating, publishing, and selling all of the subject matter required by the claims of the '027 Patent.<sup>9</sup> In addition, the promotional videos and transmittal letters published by Unitherm contain no confidentiality or secrecy notices. Moreover, the number of video transmittals presented as Exhibits to Plaintiffs' Brief confirm that Unitherm distributed its videos as mass mailings to essentially any and everyone in the industry whom Unitherm could identify as having any possible interest in the process. Thus, the parties agree that, as far as it relates to any and all of the requirements of the '027 Patent claims, the Unitherm in-line browning process has been openly publicized, disclosed, demonstrated, and sold, in this country, since at least 1993.

Regardless, even had Unitherm demonstrated, sold, etc., the process at issue under terms of confidentiality, all of the cases cited and relied upon by Defendant on pages 35 and 36 of its Response confirm that the '027 Patent would still be invalid under 35 U.S.C. § 102(b). None of these cases prevent the application of the 102(b) bars where a third party's (*i.e.*, Unitherm's) use, sale, etc. of the patented process were known to the patentee/inventor (*i.e.*, Defendant/Prem Singh)

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<sup>9</sup>The Unitherm trade secret information disclosed by Defendant in the claims of the '027 Patent is the mention in claim 10 that an infrared oven alternatively could be used for the browning step. However, claim 10 does not require the use of an infrared oven but simply lists such a device as one of five options.

named in the patent. Rather, the cases cited by Defendant consistently affirm that (a) any such use by another person not under an obligation of secrecy to the patentee/inventor constitutes a "public use" under § 102(b); (b) such use constitutes a "public use" even if knowledge thereof is confined to only one person; and (c) the patentee cannot relinquish control of the claimed invention and avoid any of the § 102(b) bars.

For example, citing the United States Supreme Court's decision in *Egbert v. Lippmann*, 104 U.S. 333 (1881), the Federal Circuit held in *In re Smith*, 714 F.2d 1127, 1134 (Fed. Cir. 1983) that:

"Public use" of a claimed invention under § 102(b) has been defined as any use of that invention by a person other than the inventor who is under no limitation, restriction or obligation of secrecy to the inventor.  
(emphasis added); see also, *Articulate Sys., Inc. v. Apple Computer, Inc.*, 53 F. Supp. 2d 62, 76 (D. Mass. 1999). "If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, even though the use and knowledge of the use may be confined to one person." *Egbert v. Lippmann*, 104 U.S. 333, 336 (1881) (emphasis added). "[I]f the inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is, with his consent, put on sale for such use, then it will be in public use and on public sale, within the meaning of the law." *TP Labs., Inc. v. Prof'l Positioners, Inc.*, 724 F.2d 965, 971 (Fed. Cir. 1984), cert. denied, 469 U.S. 826 (1984).<sup>10</sup>

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<sup>10</sup>Concerning Defendant's irrelevant and contradictory argument that Unitherm imposed an obligation of secrecy on Defendant (*i.e.*, the patentee/inventor named in the patent), it is noted that, under *OddzOn Prods. v. Just Toys*, 122 F.3d 1396 (Fed. Cir. 1997), cited by Defendant, such disclosure would also render the claims of the patent invalid under 35 U.S.C. §§ 102(f) and/or 103. In upholding the decision of the district court that another party's confidential disclosure of two designs to the alleged inventor in a patent constituted prior art under 35 U.S.C. §102(f)/103, the Federal Circuit stated that § 102(f) "does not pertain only to public knowledge, but also applies to private communications between the inventor and another which may never become public." *OddzOn*, 122 F.3d at 1401-02.

**VI. UNITHERM'S VIDEOS, TRANSMITTALS, AND  
OTHER PUBLICATIONS MORE THAN ADEQUATELY  
DISCLOSE THE INVENTION CLAIMED IN THE '027 PATENT**

Defendant contends that Unitherm's videos, transmittals, and other published materials do not sufficiently disclose the claimed invention to constitute "printed publications" under the 35 U.S.C. § 102(b) publication bar. However, as shown in ¶¶ 16-21 of Plaintiffs' Brief and as can be seen by examining the materials themselves, Unitherm's videos, transmittals, and other publications disclose and describe pre-dried, precooked, whole muscle turkey and ham products being dipped in MAILLOSE or liquid smoke and passed through a circulating air oven for less than eight minutes at a temperature effective to develop a golden brown color with a product yield of as much as 99%. These materials further show and describe the successful attainment of shades of golden brown ranging from very light to very dark, as well as inherent liquid pickup amounts within all ranges called for in the claims. The materials also disclose a core temperature increase of only 1°F. Thus, these publications alone are sufficient to anticipate all of at least claims 1-7, 10-12, 15-23, 26 and 29-36 under § 102(b) and are also sufficient to render all of the remaining claims of the '027 Patent obvious under 35 U.S.C. § 103.

It can also be seen by examining the claims and specification of the '027 Patent that the disclosure in Unitherm's published materials is more than sufficient to allow those skilled in the art to practice the process as claimed. As discussed in the briefing of Defendant's motion for attorneys fees, there is very little information contained in the '027 Patent which Unitherm has withheld from the public as a trade secret. Moreover, none of Unitherm's trade secret information is necessary to practice the process as claimed. Rather, Unitherm's trade secrets deal primarily with the internal equipment operation, controls, and programming of the Unitherm system. Such information is

neither called for in the claims nor even mentioned in the specification of the '027 Patent and is therefore irrelevant to the question of publication under 35 U.S.C. § 102(b).<sup>11</sup>

Further, whether Unitherm "disclosed" the invention is completely irrelevant to the question of whether Unitherm placed the claimed process on sale or in public use. In refusing to create an exception to 35 U.S.C. § 102(b), the Federal Circuit stated in *J.A. LaPorte, Inc. v. Norfolk Dredging Co.*, 787 F.2d 1577, 1583 (Fed. Cir. 1986) that "our precedent holds that the question is not whether the sale, even a third party sale, 'discloses' the invention at the time of the sale, but whether the sale relates to the device that embodies the invention." *See also, Abbott Lab. v. Geneva Pharms., Inc.*, 182 F.3d 1315, 1319 (Fed. Cir. 1999). "Actual use, knowledge, or awareness on the part of consumers, either general or specialized, is not required, and for the purposes of 102(b) 'it is not public knowledge of [an] invention which precludes patenting, but [rather] a public use. . .of it.'" *System Mgmt. Arts, Inc. v. Avesta Techs., Inc.*, 87 F. Supp. 2d 258, 269 (S.D.N.Y. 2000). "First, and most important, 'there is no requirement that the activities which constitute the 'on sale' or 'public use' bars be enabling, in the sense of disclosing the invention in such detail as to put the public in possession of the invention itself.'" *Id.* at 269-70.

**VII. DEFENDANT'S USE OF ITS OWN ENERCYST SYSTEM  
TO PRODUCE GOLDEN BROWN MAILLOSE PRODUCT FOR SALE  
RENDERS THE '027 PATENT INVALID UNDER 35 U.S.C. §§ 102(b) AND/OR 103**

Plaintiffs have also presented uncontroverted evidence establishing that: (1) subsequent to viewing the Unitherm demonstration on September 30, 1993, Hussain conducted his own successful

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<sup>11</sup>In fact, if information not disclosed in the '027 Patent were necessary to practice the process as claimed, then the '027 Patent would, by definition, also be invalid under 35 U.S.C. § 112, ¶ 1 as failing to provide an enabling disclosure. *See, e.g., Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir. 1988); *see also In re Epstein*, 32 F.3d 1559, 1568 (Fed. Cir. 1994); *Lockwood v. American Airlines*, 107 F.3d 1565, 1570 (Fed. Cir. 1997) ("Moreover, the '359 patent itself does not disclose the level of detail that Lockwood would have us require of the prior art. For these reasons, Lockwood fails to show a genuine issue of material fact precluding summary judgment.").

confirmation run in Defendant's Enercyst System using MAILLOSE to produce golden brown product (Plaintiffs' Brief, ¶ 85); (2) thereafter, in January of 1994, per Hussain's direction, Defendant began using MAILLOSE in its Enercyst System for commercial production of golden brown, precooked, whole muscle turkey products (*Id.*, ¶ 86); and (3) these products were given UPC code numbers and the commercial labels thereon which were changed in accordance with the change to MAILLOSE (*Id.*). Defendant does not deny the testimony of its own employees, Hussain and Singh, that Defendant only applies such UPC codes and makes such label changes when the product is for commercial sale to the public. Defendant also does not deny that such commercial production continued through at least mid-February of 1994. Rather, Defendant indicates only that production was eventually discontinued, not because of any problem with the product, but simply because the Wells facility was not well ventilated.

The foregoing evidence establishes that this commercial product was offered for sale and sold to the public. Any knowledge and information to the contrary is strictly within the control of Defendant. Yet, Defendant has not produced an affidavit from someone at the Wells plant, or from anyone else employed by Defendant, stating that, in spite of the commercial coding and labeling of the product and in spite of the length of production run, none of this product was sold or even offered for sale.

Moreover, this production run in 1994 was in no way experimental. As discussed, it is Defendant's contention that Defendant had already reduced the patented process to practice in 1990 using this very same Enercyst System in Wells, Minnesota.<sup>12</sup> However, even without Defendant's

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<sup>12</sup>See e.g., *Zacharin v. United States*, 213 F.3d 1366, 1369-70 (Fed. Cir. 2000) (Because Zacharin stipulated that the t-RAD had been reduced to practice before the 0095 contract was entered into, he cannot now argue that the purpose of the 0095 contract was testing of the t-RAD design.); *Atlantic Thermoplastics Co. v. Faytex Corp.*, 5 F.3d 1477, 1480 (Fed. Cir. 1993) ("Furthermore, experimental use does not defeat the on-sale bar once the invention has been reduced to practice.");  
(continued...)

alleged reduction to practice in 1990, the undisputed facts establish that in November of 1993, well prior to beginning the actual production run in January of 1994, Hussain confirmed the successful use of a browning liquid pyrolysis product (*i.e.*, MAILLOSE) in the Enercyst System to produce golden brown, precooked whole muscle turkey breast products.

**VIII. DEFENDANT'S UNSUPPORTED AND CONFLICTING  
DENIALS AND EXCUSES CANNOT SUFFICE TO RAISE A GENUINE  
ISSUE OF FACT AS TO DEFENDANT'S INEQUITABLE CONDUCT**

As can be seen by reading these cases in their entirety, Defendant's attempts to characterize *Scripps Clinic & Research Found. v. Genentech, Inc.*, 927 F.2d 1565, 1583 (Fed. Cir. 1991) and *Baker Oil Tools, Inc. v. Geo Vann, Inc.*, 828 F.2d 1558, 1566 (Fed. Cir. 1987) as standing for the proposition that inequitable conduct is not conducive to resolution on summary judgment are completely incorrect and misleading. No such rule exists. Rather, as summarized by the Federal Circuit in *Paragon Podiatry Lab. v. KLM Lab.*, 984 F.2d 1182, 1190 (Fed. Cir. 1993):

While our precedent urges caution in the grant of summary judgment respecting a defense of inequitable conduct, summary judgment is not foreclosed.

The Court further noted that “[t]he defense of inequitable conduct in a patent suit, being entirely equitable in nature, is not an issue for a jury to decide.” *Id.*<sup>12</sup>

The Court in *Paragon* affirmed the District Court’s grant of summary judgment for inequitable conduct where (as in this case) the patentee was aware that sales were made more than

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<sup>12</sup>(...continued)

*Nordberg Inc. v. Telsmith, Inc.*, 881 F. Supp. 1252, 1285-86 (E.D. Wis. 1995) *aff’d*, 82 F.3d 394 (Fed. Cir. 1996) (“This principle simply reflects the fact that ‘the legal definition of the date of reduction to practice appears to equate it precisely with the end of the experimental period for purposes of § 102(b)’”).

<sup>13</sup>For additional examples of two very recent cases wherein the Federal Circuit affirmed summary judgment on the basis of inequitable conduct, *see, e.g., GFI, Inc. v. Franklin Corp.*, 265 F.3d 1268 (Fed. Cir. 2001) and *Brassler, U.S.A.I., L.P. v. Stryker Sales Corp.*, 267 F.3d 1370 (Fed. Cir. 2001).

one year prior to its filing application for patent. Also similar was the patentee's response in *Paragon* to the evidence of inequitable conduct. The patentee's response consisted of conclusory statements to the effect that such sales were merely for purposes of experimentation or testing. However, in rejecting the patentee's conclusory arguments and denials, the Court in *Paragon* held:

KLM having made a *prima facie* case of inequitable conduct by satisfying both elements thereof, the burden shifted to Paragon to come forward with evidence which would require reassessment of the validity of the defense.

*Id.* at 1191. The court added that “[t]he expression by the inventor of his subjective intent to experiment, particularly after institution of litigation, is generally of minimal value.” *Id.* at 1186 (quoting *TP Labs. v. Prof'l Positioners, Inc.*, 724 F.2d 965, 972 (Fed. Cir. 1984)).

Regarding the evidence of pre-critical date commercial sales, the Court opined:

Absent explanation, the evidence of a knowing failure to disclose sales that bear all the earmarks of commercialization reasonably supports an inference that the inventor's attorney intended to mislead the PTO. The concealment of sales information can be particularly egregious because, unlike the applicant's failure to disclose, for example, a material patent reference, the examiner has no way of securing the information on his own.

*Id.* at 1193. The Court further stated that “merely conclusory statements or completely insupportable, specious, or conflicting explanations or excuses will not suffice to raise a *genuine* issue of fact.” *Id.* at 1190. In this case, Defendant's Response is once again seriously flawed because Defendant has wholly failed to rebut Plaintiffs' uncontroverted evidence of materiality and intent to mislead. (Court's emphasis).

#### **IX. DEFENDANT'S CURSORY AND BLANKET EVIDENTIARY OBJECTIONS SHOULD BE OVERRULED**

Defendant's Motion to Strike is relegated entirely to footnotes appearing in its Response to Plaintiffs' Motion for Partial Summary Judgment. It is comprised of conclusory objections relating

to authentication and hearsay. As demonstrated below and the attached affidavits, Defendant's objections should be overruled.

"Motions to strike are generally disfavored and infrequently granted." *Austin South I, Ltd. v. Barton-Malow Co.*, 799 F. Supp. 1135, 1145 (M.D. Fla. 1992). Defendant's footnote Motion to Strike is an improper procedural vehicle. The Federal Rules of Civil Procedure only recognize a Motion to Strike as it relates to "pleadings." Fed. R. Civ. P. 12(f); see *Norman v. So. Guar. Ins. Co.*, 191 F. Supp. 2d 1321, 1328 (M.D. Ala. 2002); *Morgan v. Sears, Roebuck & Co.*, 700 F. Supp. 1574, 1576 (N.D. Ga. 1988). Rather, "the proper procedural avenue to assert a motion to strike is through a separate court filing, not in the midst of a summary-judgment brief." *Norman*, 191 F. Supp. 2d at 1328.

Defendant's improper attempt to wedge dozens of evidentiary objections into its Response has forced Plaintiffs to respond to all objections in the limited forum of a Reply brief. Nevertheless, Defendant's objections are superficial and represent such an unrealistic view of authentication and evidence in business litigation that they are easily overcome. There is no doubt that any court would strongly admonish a party who attempted to repeatedly raise such objections at trial and would require agreements as to the vast majority of these documents prior to trial.

Due to the vast number of objections interposed by Defendant, should the Court find any documents necessary to a decision on summary judgment which require further authentication or additional foundation to support a hearsay exception under the business record exception, Plaintiffs respectfully request leave to address such evidence. Plaintiffs believe they have addressed all of Defendant's objections. Nevertheless, discovery has been stayed pending resolution of these motions, and, with the Court's leave, Plaintiffs can take depositions of additional non-parties to fulfill these very basic foundational requirements. See *United States v. Charles George Trucking*

*Co.*, 624 F. Supp. 1185, 1187 (D. Mass. 1986) *aff'd*, 823 F.2d 685 (1st Cir. 1987) (allowing supplementation of affidavits and exhibits for authentication).

**A. Plaintiffs Have Properly Authenticated All of The Exhibits Attached to the Motion for Summary Judgment.**

"[T]he burden of proof for authentication is slight." *United States v. Reilly*, 33 F.3d 1396, 1425 (3d Cir. 1994) (quoting *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 927 (3d Cir. 1986)). Moreover, this Court has broad discretion in deciding evidentiary matters and its decision is proper unless it is based upon an "arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Estate of Bishop v. Equinox Int'l Corp.*, 256 F.3d 1050, 1055 (10th Cir. 2001), *cert denied*, 151 L. Ed.2d 972, 122 S. Ct. 1069 (U.S. 2002); *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991)..

Authentication of evidence under Fed. R. Evid. 901(a) merely involves a showing that the document is what the proponent claims it to be. As illustrated in section 901(b), there exist a myriad of methods by which a document may be authenticated through either direct or circumstantial evidence. Furthermore, the illustrations in Rule 901(b) are merely examples, and a court may exercise its broad discretion to use any other reliable means to authenticate a document. 5 *Weinstein's Federal Evidence* § 901.03 at p. 901-19 (2d ed. 2001) (citing cases); *see also United States v. Simpson*, 152 F.3d 1241, 1249-50 (10th Cir. 1998).

The majority of the documents objected to by Defendant are sufficiently authenticated in the attached affidavits by persons with knowledge as set forth in Rule 901(b)(1). "Because the Federal Rules of Evidence favor admitting any evidence that might assist the trier of fact, and in recognition of the proponent's light burden of proof in authenticating an exhibit [. . .], the 'knowledge' requirement of Rule 901(B)(1) is liberally construed." *Weinstein* § 901.03[2] at p. 901-21.

Oftentimes a witness need not be familiar with specific exhibits to be sufficiently knowledgeable to authenticate or identify them. Business records and records of government agencies, for example, are frequently authenticated by witnesses who have never seen the specific records that comprise the exhibits and know nothing about the specific information they contain.

*Id.* at p. 901-22.

Even without a subscribing witness, an exhibit can be authenticated merely through circumstantial evidence, based upon its “[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” Rule 901(b)(4). Likewise, the “specificity, regularity, and official appearance of the documents increase the likelihood of their being authentic.” *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 929 (3d Cir. 1985) (citing numerous cases showing content and circumstances of document sufficient to authenticate without a subscribing witness).

For example, letters and memoranda can be authenticated merely by reference to the content or context of the letter, its letterhead or other labels. *Denison v. Swaco Geograph Co.*, 941 F.2d 1416, 1423 (10th Cir. 1991); *Barry Wright Corp. v. ITT Grinnell Corp.*, 1981 U.S. Dist. LEXIS 9432 (D. Mass. Feb. 26, 1981) (authenticating internal corporate memorandum which identified known parties and which contents were consistent with such a communication). If a letter or memoranda is a reply to a previous communication, it is authenticated. *Winel v. United States*, 365 F.2d 646, 648 (8th Cir. 1966). Likewise, forms are especially subject to authentication. *United States v. Henry*, 164 F.3d 1304, 1309 (10th Cir. 1999). Production of exhibits in response to a request for production under Rule 34 or a subpoena also is circumstantial evidence of authenticity. *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 562 (5th Cir. 1998); *United States v. Lawrence*, 934 F.2d 868, 870-71 (7th Cir. 1991); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 285 (3d Cir. 1983).

Courts are also less likely to sustain an authenticity objection when the objecting party has proffered no evidence challenging the authenticity of the exhibit as a fraud or forgery. *McConathy*, 131 F.3d at 562; *United States v. Coohey*, 11 F.3d 97, 100 (8th Cir. 1993) ("it is notable that Coohey does not allege that the records were not authentic or that they had been created or in any way altered by the [plaintiff]"). Defendant makes no such allegation here.

These same guidelines apply to recordings. For example, video or audio tapes which show what they purport to show are authenticated. If a subscribing witness viewed what is being demonstrated in the videotape, that videotape is authenticated. *United States v. Mills*, 194 F.3d 1108, 1111-1112 (10th Cir. 1999); *United States v. McIntyre*, 836 F.2d 467, 469-70 (10th Cir. 1987). David Howard's Amended Affidavit attached hereto as Ex. "G" properly authenticates all of the videotapes submitted in support of summary judgment.

The attached affidavits of Michael Briggs, Jeff Dierenfield, and the Amended Affidavit of David Howard are sufficient to fully authenticate all of the exhibits attached to Plaintiffs' Motion for Partial Summary Judgment.<sup>14</sup> As these affidavits also establish the basis for the business records exception to hearsay under Rule 803(6), they further authenticate these exhibits pursuant to Rule 902(11).

#### **B. Defendant's Hearsay Objections Should Be Overruled.**

Defendant's hearsay objections relate to classic business records documents. This Court is granted wide discretion in its determination of whether a document is hearsay. *United States v. Johnson*, 971 F.2d 562, 571 (10th Cir. 1992) ("Furthermore, when the matter being reviewed is a trial court's ruling on a hearsay question, we afford the trial court heightened deference."). Many of these documents also are nonhearsay in the context of this motion, because they are not offered for

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<sup>14</sup>

These affidavits cover Ex. G-I attached hereto.

the truth of the matter asserted. Rather, they show knowledge on the part of the actors or constitute proof of an act as opposed to proof of the contents of the document.

The business records exception essentially is what makes proof in business litigation possible without calling virtually hundreds of members of various businesses as subscribing and authenticating witnesses. As courts have repeatedly held:

To be admitted under that exception "the person who actually prepared the documents need not have testified so long as other circumstantial evidence and testimony suggest their trustworthiness." Nor is it required "that the records be prepared by the business which has custody of them."

*United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984) (citing cases). The phrase "other qualified witness" in Rule 803(6) is broadly construed. *Resolution Trust Corp. v. Eason*, 17 F.3d 1126, 1132 (8th Cir. 1994) ("other qualified witness" need not have personal knowledge regarding the creation of the document offered, or personally participate in its creation; or even know who actually recorded the information.)

Indeed, not only are the records of one's own business covered under the exception, but records received from other businesses come within the exception. *Johnson*, 971 F.2d at 571 (admitting documents subscribed by witness who received documents in regular course of business from third party); *Parker*, 749 F.2d at 633 ("That the witness and his company had neither prepared the certificate nor had first-hand knowledge of the preparation does not contravene Rule 803(6).")

This is especially the case with documents such as purchase orders or records of sale received by the subscribing company from others and which are maintained in the ordinary course of business.

*United States v. Mitchell*, 85 F.3d 800, 812 n.11 (1st Cir. 1996) (business record foundation for letter received from third party and made part of insurance claims file was properly established by insurance company employee); *United States v. Childs*, 5 F.3d 1328, 1332-34 (9th Cir. 1993)

(admitting documents received by subscribing company and citing similar cases); *Falk v. Axiam Inc.*, 944 F. Supp. 542, 546 (S.D. Tex. 1996). As a decision based upon Rule 803(6) involves the trustworthiness of the document, it is also highly probative of admissibility when the objecting party has not raised a dispute or doubt regarding the trustworthiness of the document. *See Johnson*, 971 F.2d at 571; *Falk*, 944 F. Supp. at 546-47. Defendant has not raised any factual or other doubt as to the authenticity or trustworthiness of any documents to which it objects. Even where courts find that the requirements of Rule 803(6) have not been met, they may allow the admission of the documents under Rule 807's residual hearsay doctrine. *United States v. Laster*, 258 F.3d 525, 529 (6th Cir. 2001) *cert. denied*, 151 L. Ed.2d 1010, 122 S.Ct. 1116 (U.S. 2002). In *Laster*, the court admitted purchase orders and related documents under the residual hearsay exception where there was "no indication that the records were not reliable."

The attached affidavits identify that all of the exhibits objected to by Defendant are properly classified as exceptions to the hearsay rule. Especially in those instances when a party or non-party has produced documents from their business records pursuant to a request for production or subpoena, it is difficult to contend that they are not documents regularly maintained in the course of business. *Cf. Lawrence*, 934 F.2d at 871.

While it is impossible here to respond individually to each of the documents discussed in the footnotes to Defendant's brief, many of these documents are not, in fact, hearsay, notwithstanding any applicable exception. The following are significant examples:

Exhibit 5 to Mr. Howard's original affidavit is a document Bates-stamped U-6005 and which was produced from Unitherm's files. It qualifies as a business record as set forth in the Amended Howard Affidavit, but also is not submitted for the truth of the matter asserted regarding the parameters of the future testing. Rather, the letter is intended to show that the preceding exhibits and demonstrations were conducted in the context of a potential sale or offer to sell the process in 1993.

Exhibit 9 to Mr. Howard's original affidavit is also a document which qualifies as a business record. In addition, the document is not offered for the truth of the matter asserted that Red Arrow and Unitherm work better together, but as clearly set forth in Paragraph 14 of Plaintiffs' opening Brief the document is used to show that Unitherm and Red Arrow were not working together exclusively.

Exhibit 59 are clearly business records as set forth in the Amended Howard Affidavit, and demonstrate the cursory nature of Defendant's hearsay objections. These solicitations are not offered for the truth of the claims made in these 200 letters, but to show knowledge among ConAgra and the rest of the market that the Unitherm Process was for sale and being exhibited. Moreover, an invitation to a demonstration is not the statement of a fact to be proven, but an act in itself, which is not hearsay. Mr. Howard's Amended Affidavit also confirms the fact of these invitations.

Exhibits 66 and 67 are likewise business records, but are not introduced for the truth of the matters asserted in the letter, but to show that ConAgra had knowledge and was on notice that Unitherm had sold the Process prior to April 21, 1997. Other record evidence established that these sales did in fact occur.

Exhibit J to Plaintiffs' Brief is the Deposition of Prem Singh. Attached to that deposition is Deposition Exhibit 27. That document is an April 18, 1996 letter to Defendant from David Howard of Unitherm setting forth the terms of a sale of the Unitherm Process. That document is a business record and is offered not for the truth of the matters asserted regarding price and delivery terms. Rather, as Paragraph 39 of Plaintiffs' Brief states, it is offered to show that Unitherm made an offer to sell the Unitherm Process to Swift Eckrich.<sup>15</sup>

Defendant's Motion to Strike is an improper and ineffectual procedural vehicle. Nevertheless, Plaintiffs have shown that all of its evidence would be admissible in a trial of this matter. To the extent that the Court determines that certain exhibits necessary to its decision require further authentication or additional supporting witness testimony, Plaintiffs request leave to obtain that information once the discovery stay has been lifted.

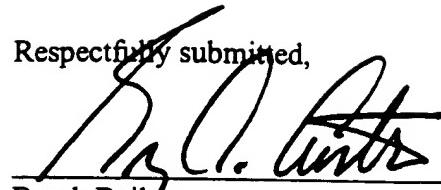
#### X. CONCLUSION

The foregoing considered, Plaintiffs request that the Court enter partial summary judgment finding that the '027 Patent is invalid and unenforceable.

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<sup>15</sup>A copy of the exhibit is attached to this Brief as Exhibit "J."

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

This is to certify that on this 3rd day of July, 2002, a true and correct copy of the above and foregoing was filed and mailed, postage prepaid, to:

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